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Supreme Court of the United States

OCTOBER TERM, 1940

No. 676

CASKEY BAKING COMPANY, INCORPORATED, *Appellant*,

v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

Appeal from the Supreme Court of Appeals of Virginia.

BRIEF ON BEHALF OF APPELLANT.

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v.

COMMONWEALTH OF VIRGINIA, *Appellee*.

Appeal from the Supreme Court of Appeals of Virginia.

BRIEF ON BEHALF OF APPELLANT.

TO THE HONORABLE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

All numbers in parentheses, preceded by the letter "R" refer to pages of the Record, unless otherwise noted. Sections 73, 192 and 192 b of the Tax Code of Virginia, are referred to as Section 72, Section 192 and Section 192 b, respectively. They are set out *in extenso* herein as Appendix A, B and C, respectively.

STATEMENT OF THE CASE.

This case comes here on appeal from the Supreme Court of Appeals of Virginia. It involves the constitutionality of section 192 b of The Tax Code of Virginia. An order noting probable jurisdiction was entered here on the 3rd day of February, 1941, to review a judgment of the Supreme Court of Appeals of Virginia, affirming a judgment of the Corporation Court of the City of Winchester, Virginia.

The case was heard upon a stipulation of facts (R. 15, *et seq.*), a condensed statement of which is as follows:

The Caskey Baking Company, Incorporated, a West Virginia corporation, has its principal office and place of business in the City of Martinsburg, West Virginia. It is domesticated in Virginia. (R. 16.) It complied with the Virginia law relative to foreign corporations, pays its annual registration fee, has fully complied with the State income tax upon its net profits allocable to its Virginia business. (R. 16.)

It is engaged in making and selling bread in the territory tributary to Martinsburg. The bakery products were and are sold to grocers and other retail dealers in Winchester and other places in Virginia. (R. 16, 17.)

These bakery products, after manufacture in Martinsburg, West Virginia, are taken to Virginia in appellant's trucks, by its employees. Each truck is operated over a regular route and at regular intervals. (R. 17.) The employee calls on the grocer and other retail dealers, all of whom are regular customers of appellant, ascertains what amount of bread is needed, gets it out of the truck and delivers the product. (R. 17.) In other words, the bread is sold and delivered at the same time to the regular customer. This practice of selling, or offering for sale, and delivering at the same time is carried on with retail dealers from place to place in Virginia. (R. 17.)

The trucks were operated by employees of appellant, who were paid a fixed salary and who actually made the sales and delivered the bread and other bakery products. These

employees had no interest in the merchandise nor in the proceeds of the sales. (R. 17.)

The bread sold, it was agreed, was not injurious to the health nor damaging to the morals of the citizens of Virginia. (R. 17.)

The appellant here has no place of business in Virginia, except that in accord with the Virginia statute as a domesticated corporation, it had an office (Virginia Code 1936, section 3847), where all claims against it might be audited, settled and paid. (R. 17.)

The appellant has no property permanently located in Virginia; it was not at the time of its arrest a manufacturer taxable on capital under section 73 of the Tax Code of Virginia, nor a distributor of manufactured products paying a license tax on its purchases, nor a licensed wholesale dealer. (R. 17.)

Appellant did not secure the license prescribed by section 192 b of the Tax Code of Virginia, nor pay the tax therein provided for. (R. 16.)

On September 9th, 1938, appellant was arrested in Winchester, Virginia, charged with the violation of section 192 b, as amended by the Acts of the General Assembly of 1938, c. 305, because it sold to J. E. Keffer, a licensed retail merchant, its bakery products manufactured in Martinsburg, West Virginia, without obtaining the license required by the statute just noted. It was agreed that such sale was made in the manner herein stated. (R. 16, 18.)

The appellant was convicted and fined. An appeal was taken to the Corporation Court of the City of Winchester.

For reasons given in writing (R. 19), the Corporation Court found appellant guilty and fined it the same amount as the police magistrate (R. 26). It will be noted that the appellant urged that section 192 b was unconstitutional because it contravenes the commerce clause and the equal protection of the law clause of the United States Constitution (R. 19).

A petition for writ of error was granted and supersedeas awarded by the Supreme Court of Appeals of Virginia.

After hearing, the appellate Court affirmed the judgment in the trial Court (R. 27) for reasons given in the opinion of Mr. Justice Hudgins (R. 28, *et seq.*). It is noted that appellant urged in the Supreme Court of Appeals of Virginia that the statute was and is unconstitutional.

A petition for re-hearing was filed (R. 36), in which the same errors were urged. It was denied on October 16th, 1940 (R. 37).

A petition for appeal to this Court was filed on December 4th, 1940 (R. 38), and allowed the same day (R. 41). Assignment of errors, which were the same as here noted and as urged in the trial court, were filed (R. 40). Statement of points is likewise consistent (R. 44).

OPINIONS BELOW.

The opinion of the Corporation Court of the City of Winchester, Virginia, will be found in the record (R. 19).

The opinion of the Supreme Court of Appeals of Virginia (R. 28), is reported in 10 S. E. (2nd) 535. It has not, as yet, been officially reported.

JURISDICTION.

The jurisdiction of this Court rests upon section 237, Judicial Code, as amended. (28 U. S. C. sec. 344 a).

THE QUESTION HERE.

Appellant is either doing an intrastate business as a peddler, which is the position taken by the appellee, or is conducting an interstate business. If the former, the appellant is the subject of an unconstitutional discrimination; if the latter, the appellee has no right to impose a license as a condition precedent to carrying on an interstate business.

In either event, the Supreme Court of Appeals erred when it affirmed the judgment of the Corporation Court of the City of Winchester, and, as we shall respectfully submit, its judgment should be reversed and the case ordered dismissed.

ASSIGNMENTS OF ERROR.

The Supreme Court of Appeals of Virginia erred:

(a) In refusing to reverse the judgment of the Corporation Court of the City of Winchester, Virginia.

(b) In holding that section 192 b, as amended by the Act of 1938, chaper 305, of the Tax Code of Virginia, is not repugnant to Article 1, section 8, clause 3 of the Constitution of the United States.

(c) In holding that section 192 b, as amended by the Acts of 1938, of the Tax Code of Virginia, does not place an improper burden on interstate commerce.

(d) In holding that said section 192 b, as amended by the Acts of 1938, of the Tax Code of Virginia, does not abridge the rights of the appellant, guaranteed by Section 1 of the 14th Amendment to the Constitution of the United States, in this, that said Court refused to accept the appellant's contention that said statute,

1. Discriminates in favor of resident manufacturers and against non-resident manufacturers.

2. Denies to the appellant the equal protection of the laws of Virginia.

3. Discriminates in favor of resident peddlers and against non-resident peddlers.

ARGUMENT.

This suit is here on appeal from the Supreme Court of Appeals of Virginia, which, appellant urges, has erred to its detriment in holding a tax statute, as far as it applies to appellant, consonant with constitutional provisions. Appellant urges that this statue controverts the plain provisions of the Constitution in that

(a) It discriminates against appellant and in favor of Virginia residents similarly situated;

(b) It imposes an unjust burden upon interstate commerce.

Appellant has a plant in Martinsburg, Berkeley County, West Virginia, making and producing bread.

It sells its manufactured product to grocers and retail dealers, who are its regular customers. The bread is daily hauled in trucks by its employees over regular routes. The employee ascertains from the grocer how much bread is needed and the bread is delivered from the truck at that time. In other words, the sale is consummated and delivery is made simultaneously.

As noted in the history of section 192 b of the Tax Code of Virginia, the Commonwealth of Virginia in 1938, by amendment provided for a license tax on this character of business, provided the person or corporation did not come under the exemptions therein noted. These exemptions were (a) wholesale dealers regularly licensed by the State, (b) distributors or vendors of motor vehicle fuels, (c) vendors of tobacco, (d) vendors of seafood, (e) a producer of agricultural products, (f) a manufacturer taxable on capital by the Commonwealth of Virginia, and (g) a distributor of manufactured goods paying a State license on his purchases.

The appellant does not come within the provision of any of these exemptions. It is not a producer of agricultural products, nor a vendor of vehicle fuels, tobacco or seafood; it is a manufacturer, but it is not taxed on capital by the State of Virginia (See Appendix A for definition of "Capital", as defined in the Tax Code. See Appendix C for section 192 b of the Tax Code.).

HISTORY OF 192 b OF TAX CODE.

Prior to the amendment of 1938, section 192 b exempted "a producer" from the peddler's license tax. The amendment added the words "of agricultural products" to the word "producer". No effort was made, it will be conceded, to collect any license tax from appellant prior to the passage of the amendment.

Prior thereto, being a producer, appellant was exempt. Evidently the amendment was intended to reach the appellant and those similarly situated, as well as producers of ice and other such products.

When appellant was deprived of its status as a producer, it was discriminated against. It could not be a manufacturer "taxable on capital by this State". The amendment was so drawn that the intention was plain—to discriminatae against all save persons taxable upon capital in Virginia.

It is our contention that

(1) A license tax imposed for the unconditional right of peddling is a revenue tax. When domesticated a foreign corporation is entitled to equal treatment and revenue statutes must conform to the equal protection clause of the 14th Amendment.

(2) The statute, 192 b, under consideration, is unconstitutional, because it makes unreasonable and arbitrary classifications of persons in similar circumstances, in defiance of the plain import of the Fourteenth Amendment.

(3) The statute is unconstitutional, because it renders lawful in the State of Virginia, for all persons taxed upon capital therein, an act unlawful for citizens of other States, under penalty of conviction and fine, unless the latter pay license taxes to which the resident is not subjected.

(4) The statute is unconstitutional, because there is an injurious discrimination against appellant's goods by reason of their source.

(5) The statute is unconstitutional, because it discriminates in favor of persons taxable upon capital in Virginia and against those not similarly situated. Its exemptions are arbitrary and unreasonable.

(6) The method of doing business pursued by appellant is interstate commerce. Because of discrimination against interstate commerce, the statute is unconstitutional.

We will now discuss these several propositions.

1. A license tax imposed for the unconditional right of peddling is a revenue tax. When domesticated foreign corporations are entitled to equal treatment and revenue statutes must conform to equal protection clause of the 14th amendment.

The Virginia Court has held that a license tax imposed for the unconditional right of doing any act, without regulations, is a revenue tax.

Phoebus v. *Manhattan Social Club,* 105 Va. 144, 52 S. E. 839.

Everyone has a common law right to peddle. The statute under consideration simply attempts to raise revenue by taxing this common law right of non-residents to the exclusion of residents of Virginia. This is unequal treatment and results in discrimination of the non-resdent.

When the appellant was domesticated in Virginia, it was put on a level with domestic corporations of the same kind, and stands equal with them. Any tax laws made to apply, after a foreign corporation has been so received into the State, are to be considered laws enacted for the purpose of *raising revenue* for the State and must conform to the equal protection clause. *Hanover Fire Ins. Co.* v. *Carr,* 272 U. S. 494, 71 L. Ed. 372.

2. The statute, 192 b, under consideration, is unconstitutional, because it makes unreasonable and arbitrary classification of persons in similar circumstances in defiance to the plain import of the Fourteenth Amendment. Its exemptions are arbitrary and unreasonable.

Legislation may be adjusted to differences in things and situations, but it is limited to the extent that the 14th Amendment of the Federal Constitution demands that it make no unreasonable or arbitrary classification or discrimination, which amendment requires the same methods to be applied to all the constituents of the class subjected to the taxation and equal and uniform operation upon all persons in similar circumstances.

It will be noted that section 192 b exempts from its provisions a distributor or vendor of motor vehicle fuels, petroleum products, tobacco, seafood, producer of agricultural products, *a manufacturer taxable on capital by Virginia,* or a distributor of manufactured goods paying a State license on his purchases. The law provides for a license tax of no less than One Hundred Dollars ($100.00) for each vehicle used in the peddler's business, from persons not exempt.

It, therefore, appears from these considerations that the appellant occupies a position, under 192 b, which is by no means on an equality with the persons exempted thereby. The exempted parties have an absolute right to peddle their products without paying the tax under 192 b. True, some of those exempted are paying taxes in another capacity, but those taxes are not for the privilege of peddling. They are paid for the rights and benefits which accrue to them as residents of Virginia. For that matter the applicant is likewise paying such taxes in West Virginia and has been domesticated in Virginia to carry on its business of selling bakery products.

Both the resident manufacturer and the appellant pay income taxes on their Virginia business. Both pay corporation taxes. The resident pays a tax on the capital, as de-

fined in section 73 (Appendix A). The appellant does not, because it has no capital in Virginia. The resident manufacturer produces in Virginia; the appellant manufactures in another state. Both sell in Virginia. But because one manufactures in Virginia and hence pays a tax upon capital, and the other does not, the latter is discriminated against.

This situation is reached in the recent case of *Best and Company* v. *Maxwell*, decided this term, (No. 61) Adv. Op. 274, when Mr. Justice Reed said in the concluding paragraph:

> "The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language".

Regardless of the tax structure of Virginia and the economic forces which seek to lay taxes to equalize the burden, a tax on capital owned by one person cannot be used as an excuse to exempt this person from a peddler's license, against another in the same class, who, because it is a nonresident, is not liable to be assessed upon capital in Virginia. Both, then, have the privilege, for which one need not pay; the other must. Certainly a tax upon capital cannot be used as an excuse for a discriminatory license tax.

This method is not novel. This Court had this very question before it in *Ward* v. *Maryland*, 79 U. S. (12 Wall.) 418, 20 L. Ed. 449. In that case, persons not permanent residents of Maryland were prohibited from *selling, offering for sale or exposing for sale*, any goods whatsoever, other than agricultural products and articles manufactured in the State, in any manner, whether he be the maker or manufacturer or not, without first obtaining a license to do so.

Mr. Ward, a citizen of New Jersey and not a permanent resident of Maryland, sold by sample certain goods without obtaining the license. He was convisted and appealed.

This Court, speaking through Mr. Justice Clifford, *inter alia,* said

> "Comprehensive as the power of the States is to lay and collect taxes and exeises, it is, nevertheless, clear, in the judgment of the Court, that the power cannot be exercised to any extent in a manner forbidden by the Constitution; and inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that district, *without being subjected to any higherk tax or excise than that exacted by law of such permanent residents*".

And again

> "Grant that the States may impose discriminating taxes against the citizens of other States and it will soon be found that the power conferred upon Congress to regulate inter-state commerce is of no value, as the unrestricted power of the States to tax will prove to be more efficacious to promote inequality than any regulation Congress can pass to preserve the equality of right contemplated by the Constitution among the citizens of the several States".

A more practical application of the unlawful exemptions of the statute is disclosed, however, by a consideration of the exempted persons. A peddler of seafood can peddle a foodstuff without paying the tax. Is there any real distinction between a peddler of sea food, and a peddler of bakery products? Each is selling nothing more than a foodstuff. Should not the seafood peddler share this burden of taxation, if that be the purpose of the statute? Obviously there is no good reason to tax a peddler of one food and exempt a peddler of another.

Likewise a peddler of tobacco. He can sell after the payment of Five Dollars ($5.00) license tax. There could not be any relation between peddlers of tobacco, sea food and

bakery products, so different, so far as revenues are concerned, that the discrimination could run the range of license taxes from zero to One Hundred Dollars ($100.00).

Admitted is it that for the purpose of taxation a State may classify objects of the tax. But the classification so made must be reasonable and rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly situated or circumstanced shall be treated alike. *Norfolk* v. *Griffin Bros.*, 120 Va. 534, 91 S. E. 640; *Colgate* v. *Harvey*, 296 U. S. 404, 80 L. Ed. 299; *State Bd. Tax Coms.* v. *Jackson*, 283 U. S. 527, 75 L. Ed. 1248. Regard must be had to the particular subject of action. *Smith* v. *Cahoon*, 203 U. S. 553, 75 L. Ed. 1264. Mere difference is not enough; discriminations cannot stand if they offend the plain standards of common sense. *Hartford Steam Boiler Inspection and Ins. Co.* v. *Harrison*, 301 U. S. 459, 81 L. Ed. 1223.

Realizing that the object of Section 192 b is to provide revenue, and recognizing the mandates of the above citations, no substantial difference between a peddler of one foodstuff and the peddler of another can be found. How could the vendor of one food be different from another? Each peddler is similarly situated; the plain standards of common sense are offended.

In *Smith* v. *Cahoon*, 203 U. S. 553, 75 L. Ed. 1264, a Florida statute required a certificate of convenience and necessity for hauling for compensation commodities in trucks on regular routes, exempting those companies "engaged exclusively in the transporting of agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point," etc. Speaking for this Court Mr. Chief Justice Huges, *inter alia*, said:

> "But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, *and those who carry for hire bread or sugar*, or tea or coffee, or groceries in general, or other useful commodities."

3. The statute is unconstitutional, because it renders unlawful an act done by a person who is not taxed upon capital in the State of Virginia, unless the non-taxpayer submit to payment of unlawful taxes, that is, lawful if done by one who is or can be taxed upon capital.

What has just been urged, although pertinent, need not be restated.

When it is realized that the situs of the ownership of intangible capital, as defined by said sec. 73, is the domicile of the creditor or the owner, the discrimination against a non-resident or goods of non-resident origin, becomes more apparent. *Virginia* v. *Imperial Coal Sales Co.*, 293 U. S. 15, 79 L. Ed. 171, in interpreting sec. 73, held that money on hand and bills of account receivable have their situs, for purposes of taxation in Virginia. Moreover, as was held also by *Smith* v. *Ajax Pipe Line Co.*, 87 Fed. (2nd) 567, cer. den., 300 U. S. 677, 81 L. Ed. 882; *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193, 80 L. Ed. 1143; *First Bank Stock Corporation* v. *Minnesota*, 301 U. S. 234, 81 L. Ed. 1061; *Curry* v. *McCanless*, 307 U. S. 357, 83 L. Ed. 1339, all intangibles have their taxation situs at the domicile of the creditor or owner. This is true because they cannot be disassociated from the persons from whose relations they are derived. *Curry* v. *McCanless, supra.*

Now, how could any resident manufacturer of Virginia escape taxation on capital by Virginia? It is impossible, regardless of the business the resident might do. Even if he manufacture in another state, he would still be taxable on capital by Virginia. Obviously, then, the exemption of sec. 192 b, given to manufacturers, taxable on capital by Virginia, is a subterfuge used to veil the real intent of the statute. It could have no other purpose. Even the smallest peddler, if he is a resident of Virginia, escapes the license tax because his capital, money on hand, bills receivable, are taxable capital, thus giving him an exemption.

The same argument, then, applies to goods of foreign origin. If a manufacturer of Virginia taxable on capital

peddles them he is exempt because under sect. 73, it is impossible for him to avoid taxation on capital. The exempting provision of the statute is an illegal piece of shrewd legislation. Knowing that no non-resident could, at first instance qualify, the legislature immediately discriminated against goods of foreign origin, protecting local manufacture and manufacturers. Said Mr. Justice Field, in *Welton* v. *Missouri*, 91 U. S. 275, 23 L. Ed. 347:

> "It is sufficient to hold that the commercial power (of the Federal Government over a commodity) continues until the commodity has ceased to be the subject of discriminating legislation, by reason of its foreign character. That power protects even after it has entered the State, from any burdens imposed by reason of its foreign origin. The Act of Missouri encroaches upon this power in this respect and is, therefore, in our judgment, unconstitutional and void."

From these considerations it must be apparent that the "taxable on capital" exemption is nothing more than a veiled discrimination, which, when brought to light, discloses the obvious intent of the statute to protect local manufacturers to the detriment of those in the same situation as the appellant. No discrimination could be more selective and detrimental in its application.

4. The statute is unconstitutional, because there is an injurious discrimination against appellant's goods by reason of their source.

If there is an injurious discrimination against goods because of their source, the act is unconstitutional.

Probably as apt an illustration of the principal here involved as can be found is the case of *Guy* v. *City of Baltimore*, 100 U. S. (10 Otto) 434, 25 L. Ed. 743. There the Court laid down the law:

> "It must be regarded as settled that no State can, consistently with the National Constitution, impose upon the products of other States brought therein for sale or use, or upon citizens because engaged in the sale

> therein, or the transportation thereto, of the products of other States, more onerous public burdens or taxes than it imposes upon the like products of its own territory."

After citing and commenting upon *Woodruff* v. *Parham*, 75 U. S. (8 Wall.) 123, 19 L. Ed. 382, *Hinson* v. *Lott*, 75 U. S. (8 Wall.) 148, 19 L. Ed. 387, *Ward* v. *Maryland*, 79 U. S. (12 Wall.) 418, 20 L. Ed. 449, and *Welton* v. *Mo.*, 91 U. S. 275, 23 L. Ed. 347, Mr. Justice Harlan, restating the above principle laid down in the syllabus, said:

> "If this were not so it is easy to perceive how the power of Congress to regulate commerce with foreign nations and among the several States could be practically annulled, and the equality of commercial privileges secured by the Federal Constitution to citizens of the several States be materially abridged and impaired".

The argument made in this case by the Commonwealth of Virginia is that the indirect tax here laid on non-residents merely evens up the direct tax levied upon residents. The same argument was made in *Guy* v. *City of Baltimore*, in a little different form.

There the City owned the wharves, and, it was argued that it had the right to permit their use without any levy to vessels landing thereat with the products of Maryland. In other words, these vessels were exempt from the payment of wharf taxes, just as here, and it was urged that the vessels, laden with the products of other States, could not justly complain, so long as the wharfage fees were reasonable compensation for the use of city property.

Said Mr. Justice Harlan:

> "This proposition, however ingenious or plausable, is unsound both upon principle and authority."

The Court held the plan was gross discrimination and in effect hindered, obstructed and burdened interstate commerce. Citing *Brown* v. *Md.*, 12 Wheat. 419, Mr. Justice Harlan said:

> "The power of the National Government over commerce with foreign nations and among the several States is broad and comprehensive. *It reaches the interior of every State of the Union, so far as it may be necessary to protect the products of other States and countries from discrimination, by reason of their foreign origin.*"

And this is the law, as declared by the Virginia Court. We come now to a discussion of *Commonwealth* v. *Myer*, 92 Va. 809, 23 S. E. 915, where an ordinance identical to the statute (section 192b) was under consideration. This case was called to the attention of both the Corporation Court and the Supreme Court of Appeals. Both ignored it.

The corporation in *Commonwealth* v. *Myer* occupied the same extrastate position as appellant here, except that it had not been domesticated in Virginia. It sold its products as a peddler, through a non-resident agent, who was the defendant. For failure to pay a peddler's license tax the agent was found guilty. The statute exempted a manufacturer taxable on capital by Virginia. Said Judge Keith:

> "A citizen of Virginia who had manufactured the identical article could have hawked or peddled it from place to place within the limits of the Commonwealth without incurring the penalties denounced by Section 32. If that be so, then the statute under consideration does injuriously discriminate against the products of other states and the rights of other citizens, and is an attempt to fetter commerce among the states, and does deprive the citizen of another state of the privilege and immunities possessed by citizens of this state, and is an infringement of the provisions of the constitution and therefore void!".

How applicable to the case at bar. It cannot be imagined that any manufacturer in Virginia, corporate or natural, even though manufacturing without the state, is not taxable on capital by Virginia. Sec. 73 of the Tax Code is too inclusive to argue otherwise. It is apparent then, under *Commonwealth* v. *Myer, supra,* that not only the appellant's goods are being discriminated against, because it has not seen fit to be forced into Virginia to manufacture, a re-

sult condemned by *Bethlehem Motors Co.* v. *Flynt*, 256 U. S. 421, 65 L. Ed. 1029, but that the appellant itself is being injured.

5. The Statute is Unconstitutional Because it Discriminates in Favor of Persons Taxable Upon Capital in Virginia and Against Those Not Similarly Situated. Its Exemptions are Arbitrary and Unreasonable.

In addition to the above illustrations of discrimination, section 192 b has a further effect, wherein it exempts a manufacturer taxable on capital by Virginia. To escape the tax the foreign manufacturer must set up a factory in Virginia or become a wholesaler or distributor of manufactured goods. The only argument against this charge of inequity in this regard is that it applies alike to non-resident as well as resident manufacturers, the inference being, as suggested by *Armour* v. *Virginia*, 118 Va. 242, 87 S. E. 610, 246 U. S. 1, 62 L. Ed. 547, that its condition can be as easily met by the non-resident as by the resident manufacturer, and, therefore, it discriminates against neither. And, in any event, appellee contends appellant can become a distributor and thus escape the tax. This makes the appellant concede that it is what it is not. It forces the appellee to admit that up to the State line it is a manufacturer, but that from there on it is a distributor. The resident manufacturer is not a distributor. Why change our status?

An identical situation was considered in *Bethlehem Motors Corp.* v. *Flynt*, 256 U. S. 421, 65 L. Ed. 1029. Said Mr. Justice McKenna:

> "To this we cannot assent. The condition can be satisfied by a resident manufacturer, his factory and its products in the first instance being within the State, it cannot be satisfied by a non-resident manufacturer, his factory necessarily being in another state, some of its products in the first instance being within the State. Therefore, there is a real discrimination, and an offense against the 14th Amendment, if we assume that the corporations are within the state".

Since the appellant is a corporation domesticated in Virginia, it meets the mandate of *Bethlehem Motors* case, decided after *Armour* v. *Virginia, supra,* which latter case is not applicable to the case at bar, and if it can be so construed, it has been, to that extent, impliedly overruled.

The *Bethlehem Motors* case was called to the attention of both the Corporation Court and the Supreme Court of Appeals, and commented and insisted upon. Both of these courts ignored its existence. To have recognized it and the principle therein declared, would have meant a favorable judgment for appellant. This case clearly determines that the out-of-state manufacturer is not compelled to bring his plant and its facilities into the State of Virginia to escape discriminatory taxation.

And see, also, *Hanover Fire Ins. Co.* v. *Carr,* 272 U. S. 494, 71 L. Ed. 372, heretofore applied, which is clearly in point upon this proposition.

And because appellant will not change its method of doing business and become a wholesaler or distributor, or become a resident manufacturer taxable upon capital, it has been unjustly and ingeniously discriminated against.

Nowhere is this discrimination better illustrated than the exemptions in the act:

Oil and gas peddlers, whether resident or non-resident, are exempt.

Tobacco peddlers, whether resident or non-resident, are exempt.

A producer of agricultural products, whether resident or non-resident, is exempt.

Sea food peddlers, whether resident or non-resident, are exempt.

Manufacturers taxable on capital are exempt. Naturally only resident manufacturers can be taxed on capital (See Appendix A.)

It was noted in *Smith* v. *Cahoon, supra,* that there is no justification for taxing the transportation of one foodstuff and not another. So there is no justification for the distinction between peddling sea food and bread.

Bread is the staff of life. It is a "family supply of perishable nature". It is an article of food, as the Court knows, rapidly becomes stale and is sold for immediate consumption. *Sinclair* v. *Hathaway*, 57 Mich. 60, 23 N. W. 459. Why the difference between peddling butter, milk and eggs, etc., on the one hand, and bread, on the other? The statute makes a difference without a distinction. The statute intends to protect domestic manufacturers of bread from the inroads of the non-resident upon their business. The only way for appellant to eliminate this discrimination is to move the plant to Virginia and become taxed on capital or change his method of business and become a wholesaler or distributor. The discrimination is intentional and outstanding. The reason for it is apparent. Shall this Court permit this character of constitutional evasion to continue?

6. The Method Of Doing Business Pursued by Appellant is Interstate Commerce. Because of Discrimination Against Interstate Commerce the Statute is Unconstitutional.

The lower court relied strongly on *Wagner* v. *Covington*, 251 U. S. 95, 64 L. Ed. 157; *Howe Machine Co.* v. *Gage*, 100 U. S. 676, 25 L. Ed. 754, and *Emert* v. *Missouri*, 156 U. S. 296, 39 L. Ed. 430, to sustain the proposition that peddling is intrastate commerce. These cases simply hold that because the tax was uniform on *all* peddlers, interstate commerce was not burdened. They recognize that the carrying of the goods over a State line is interstate commerce. Said Mr. Justice Pitney in *Wagner* v. *Covington:* "Of course the transportation of plaintiff's goods across the state line is of itself interstate commerce". And quoting from *Robbins* v. *Shelby Taxing District*, 120 U. S. 489, 30 L. Ed. 694, he further said:

> "When goods are sent from one state to another for sale, or in consequence of a sale, they become part of its general property, and amenable to its laws; *provided that no discrimination* be made against them as goods from another state, and that they be not taxed

by reason of being brought from another state, but only taxed in the usual way".

And in *Shellenberger* v. *Pennsylvania,* 171 U. S. 1, 43 Law Ed. 49, holding that a statute which prohibits the importation of a marketable article and its sale is void, because beyond the power of the State, Mr. Justice Peckham found opportunity to discuss *Emert* v. *Missouri, supra.* (171 U. S. 1, 23, 43 L. Ed. 49, 57) He stated that the Court in *Emert* v. *Missouri* held the Missouri statute valid, because *it made no discrimination between residents or products of the state and those of other states.* Nor did the Emert case, said he, overrule any of the cases where discrimination to interstate commerce was found and declared.

There must be no discrimination in any form against interstate commerce; when such discrimination appears, however cunning the plan may be or how well concealed in form, this Court has denounced it as an inroad upon the right of Congress to regular commerce or as an evasion of constitutional duty.

Where lack of discrimination is present and the out of state goods are placed upon a par with intrastate commerce, then there is no discrimination and an appeal to constitutional provisions is unavailing. But, in every case, where the burden is apparent, as it is in section 192b, the statute, of necessity, has been held void.

A license tax required for the sale of goods is a tax on the goods themselves. *Brennan* v. *Titusville,* 153 U. S. 289, 38 L. Ed. 719. It is a tax on the business. *Cooney* v. *Mountain State Telephone and Telegraph Co.,* 294 U. S. 384, 79 L. Ed. 934. And therefore a tax on interstate commerce. *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 18, 35 L. Ed. 613; *Sault Ste. Marie* v. *International Transit Co.,* 234 U. S. 353, 58 L. Ed. 1337. The method of sale employed by appellant is interstate commerce. *Commonwealth of Virginia* v. *Myer, supra.* When an extra-state manufacturer, seeking to escape taxation upon the right to sell, is forced by the State of sale to come into that State, or bring assets there for taxation, it is inter-

state commerce and the tax is void. *Bethlehem Motors Corp.* v. *Flynt, supra.*

Or, as put by Mr. Justice Reed, in *Best and Company* v. *Maxwell* (No. 61, decided at this term) Adv. Op. 274, 275:

> "The commerce clause forbids discrimination, whether forthright or ingenious. In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce."

And as expressed by Mr. Justice Stone in *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U. S. 33, 48, 84 L. Ed. 565, 571:

> "Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey. Each imposes a burden which intrastate commerce does not bear, and merely because interstate commerce is being done places it at a disadvantage in comparison with intrastate business or property in circumstances such that if the asserted power to tax were sustained, the states would be left free to exert it to the detriment of the national commerce."

It is submitted, then, that the discrimination against interstate commerce, just as the discrimination against the individual, the object and purpose of the statute, is apparent and that the statute contravenes the plain provisions of the National Constitution.

THE OPINION OF THE LOWER COURT

The basis of the decision by the Supreme Court of Appeals of Virginia was *Wagner* v. *Covington*, 251 U. S. 95, 64 L. Ed. 157; *Reyman Brewing Co.* v. *Brister*, 179 U. S. 446, 45 L. Ed. 269; *New York* v. *Roberts*, 171 U. S. 658,

43 L. Ed. 323; *Armour* v. *Virginia*, 246 U. S. 1, 62 L. Ed. 547; *Howe Machine Co.* v. *Gage*, 100 U. S. 676, 25 L. Ed. 754, and *Emert* v. *Missouri*, 156 U. S. 296, 39 L. Ed. 430.

In those cases no discrimination was discovered, because the license taxes in question applied alike to both resident and non-resident manufacturers. In the *Reyman Brewing Company* case regulation of an intoxicating beverage under the police power, was a controlling factor as well as the question of a tax.

But in the case at bar, section 73 prevents a Virginia manufacturer or peddler from becoming subject to the license tax under section 192 b, at any time. Herein is the distinction between the line of decisions following these cases and the question at hand. This is the gravamen. This is the distinction overlooked by the lower court. No comment was made on this cogent distinction.

SUMMARY

It is respectfully urged that section 192 b of the Tax Code of Virginia is invalid, because:

1. It violates the 14th Amendment to the Constitution of the United States in that it discriminates in favor of resident manufacturers against non-resident manufacturers, and in favor of resident peddlers against non-resident peddlers, and denies to appellant the equal protection of the laws of Virginia.

2. It violates Art. 1, Sec. 8, Cl. 3, the commerce clause of the said Constitution by imposing a burden on interstate commerce, and, particularly a burden to which intrastate commerce is not subjected.

Respectfully submitted,

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APPENDIX A

TAX CODE OF VIRGINIA

Sec. 73. Capital of any trade or business of any person, firm or corporation, except the capital of any trade or business which capital is otherwise specifically taxed or specifically exempt from taxation. All capital of any trade or business of any person, firm or corporation, except the capital of any trade or business which is otherwise specifically taxed or specifically exempt from taxation.

"Capital as used herein is defined as follows:

First. The inventory of stock on hand, which shall include all materials for use in the business, whether at the place of business, in storage or elsewhere in the State.

Second. The excess of all bills and accounts receivable over bills and accounts payable.

Third. All money on hand and on deposit.

Fourth. All other taxable personal property of any kind whatever, including all choses in action, equities, demands and claims, but excluding the property hereinafter specifically mentioned in this section."

Real estate shall not be held to be capital under this section, but shall be listed and taxed as other real estate.

Machinery and tools used in a manufacturing or mining business taxable on capital under this section shall not be held to be capital under this section, nor shall such machinery and tools be hereafter assessed as real estate. All such machinery and tools used in a manufacturing or mining business taxable on capital under this section shall be listed for local taxation exclusively, and each city, town and county is hereby authorized to make a separate classification for all such machinery and tools and to fix the rate of levy thereon, but such rate shall not be higher than the rate imposed upon tangible personal property in such city, town, county, or district.

This section shall not be construed to apply to any profession which the State regulates by law, nor shall it be construed to include the business of farming. Property

used or employed in such professions, and in the business of farming, shall be taxable in the actual form in which it may be, and not as capital.

(Balance omitted because inapplicable)

APPENDIX B

TAX CODE OF VIRGINIA

Sec. 192. Peddlers. Any person who shall carry from place to place, any goods, wares or merchandise, and offer to sell or barter the same, or actually sell or barter the same, shall be deemed to be a peddler, and any person licensed as a peddler may sell any personal property a merchant may sell, or he may exchange the same for other articles.

A peddler's license shall not be transferable, and any person so licensed shall endorse his name on said license, and such license shall confer authority to sell within the county or city in which the license was granted and in no other county or city.

Any peddler who shall peddle for sale or sell or barter without a license shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than fifty dollars, nor more than five hundred dollars for each offense; and any person selling or offering to sell as a peddler shall exhibit his license on demand of any citizen of the county or city in which he sells or offers to sell or barter; and upon his failure or refusal to do so he shall be subject to the penalties for peddling without a license.

All persons who do not keep a regular place of business (whether it be a house or a vacant lot, or elsewhere), open at all times in regular business hours and at the same place, who shall offer for sale goods, wares and merchandise, shall be deemed peddlers under this section. All persons who keep a regular place of business, open at all times in regular business hours and at the same place, who shall elsewhere than at such regular place of business, personally,

or through their agents, offer for sale or sell, and at the time of such offering for sale, deliver goods, wares and merchandise, shall also be deemed peddlers as above, but this section shall not apply to those who sell or offer for sale in person or by their employees, ice, wood, meats, milk, butter, eggs, poultry, fish, oysters, game, vegetables, fruits, or other family supplies of a perishable nature grown or produced by them and not purchased by them for sale. But a dairyman who uses upon the streets of any city one or more wagons may sell and deliver from his wagon, milk, butter, cream and eggs in said city without procuring a peddler's license.

The license taxes imposed by this section shall not apply to any peddler who is covered by section one hundred and ninety-two-b of the Tax Code of Virginia, and who sells to licensed dealers of retailers only.

(Balance omitted because inapplicable.)

APPENDIX C
TAX CODE OF VIRGINIA

Sec. 192-b. Peddlers of goods, wares or merchandise who sell to licensed dealers or retailers. There is hereby imposed an annual State license tax on every person, firm and corporation (other than a distributor and/or vendor of motor vehicle fuels and petroleum products, tobacco, or seafood, a farmer, a farmer's cooperative association, a producer of agricultural products, or a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchase) who or which shall peddle goods, wares or merchandise by selling and delivering the same at the same time to licensed dealers or retailers at other than a definite place of business operated by the seller.

Provided, however, this act shall not be construed to apply to wholesale dealers regularly licensed by this State, and who shall at the same time sell and deliver merchandise to retail merchants.

The annual State license tax hereby imposed, as aforesaid, or every such person, firm or corporation, peddling, as aforesaid, is in the sum of one hundred dollars, for each vehicle used in such business, and the said license shall not be issued quarterly, nor shall it be issued quarterly, nor shall it be transferable, nor shall the tax be subject to proration. The license aforesaid shall be good throughout the State as a State license, but nothing herein contained shall prevent cities and towns from imposing city or town license taxes on such persons, firms, or corporations doing such business within the corporate limits of the cities and towns respectively.

Every vehicle used by any licensee hereunder shall have conspicuously displayed thereon the name of the person, firm or corporation using the same, with the post office address of the licensee, and the license hereby required shall be conspicuously displayed on each vehicle while used in such business.

Every person, firm or corporation claiming to be a distributor and/or vendor of motor vehicle fuels and petroleum products, a farmer, a dealer in forest products or tobacco, or seafood, a producer of agricultural products, a wholesale dealer, or a manufacturer taxable on capital by this State, or a distributor of manufactured goods paying a State license tax on his purchases and selling and delivering at the same time, or offering to sell and deliver at the same time, to licensed dealers or retailers, such goods, wares, or merchandise, shall, upon request of any police, tax or revenue officer, furnish evidence of his or its claim other than his or its mere statement, that he or it is exempt from the provisions of this act, and failure to furnish such evidence shall be sufficient ground for charging the person operating the vehicle with a violation of this act; and in any prosecution for a violation of this act, the claim aforesaid must be corroborated by satisfactory evidence. The exemption hereby accorded a distributor and/or vendor of motor vehicle fuels and petroluem products and a dealer in forest products or tobacco, is restricted to such peddling of

motor vehicle fuels and petroleum products and forest products, and tobacco; and in the case of a farmer, a producer of agricultural products, or a manufacturer taxable on capita by this State, the exemption is restricted to such peddling of goods, wares or merchandise actually manufactured, produced or grown by the seller.

A peddler, within the meaning of this act, is any person, firm, or corporation who or which, at other than a definite place of business operated by the seller, shall sell, or offer to sell, goods, wares or merchandise to licensed dealers or retailers, and at the time of such sale or exposure for sale, shall deliver, or offer to deliver, the goods, wares, or merchandise to the buyer, and any delivery made on the day of sale shall be construed as equivalent to delivery at the time of sale.

Every person, firm or corporation claiming exemption from the provisions of this act on the ground that he or it is delivering goods, wares or merchandise previously sold to the customer, shall, upon request of any police, tax or revenue officer, furnish evidence of his or its claims other than his or its mere statement, which evidence may be an invoice or signed order describing the goods, wares or merchandise involved, and the amount and price thereof, and failure to furnish such evidence shall be sufficient ground for charging the person operating the vehicle with a violation of this act; and in any prosecution for a violation of this act, the claim aforesaid must be corroborated by satisfactory evidence.

Every person, firm or corporation violating any provision of this act shall be guilty of a misdemeanor, and, upon conviction, shall be fined not less than fifty nor more than two hundred and fifty dollars for each offense, and each day's violation of any provision of this act shall be deemed a separate offense.

(Balance omitted because inapplicable)